

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)	
FOR TRANSFER NO. 83160)	AMENDED PRELIMINARY ORDER
IN THE NAME OF JEFFREY)	DENYING TRANSFER
<u>AND CHANA DUFFIN)</u>	

On April 2, 2019, Jeffrey and Chana Duffin (“Duffin”) filed Application for Transfer 83160 (“Application 83160”) with the Idaho Department of Water Resources (“Department”). A joint protest was filed by A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, American Falls Reservoir District #2 and Minidoka Irrigation District (collectively “the Coalition”).

The Department conducted a pre-hearing conference on August 6, 2019 and a status conference on November 13, 2019. The parties determined that the contested case could proceed to a decision without an administrative hearing. On May 22, 2020, the parties filed a *Stipulated Statement of Facts* comprising thirty-three enumerated paragraphs.

The hearing officer reviewed the *Stipulated Statement of Facts* and found that the facts were consistent with the documents contained in the Department’s water right records. Pursuant to Rule 557 of the Department’s Rules of Procedure (IDAPA 37.01.01), the hearing officer adopted the *Stipulated Statement of Facts* into the evidentiary record for the contested case.

On May 26, 2020, the hearing officer issued a *Request for Briefs*, giving the parties an opportunity to file briefs addressing the following question:

Given the *Stipulated Statement of Facts*, the documents from the Department’s water right records identified by the hearing officer, and any relevant previous decisions of the Department and/or the Idaho courts, does Application 83160 satisfy the transfer review criteria set forth in Idaho Code § 42-222(1)?

On July 17, 2020, Duffin filed *Applicant’s Argument Brief* (“Duffin Brief”) and the Coalition filed *Surface Water Coalition’s Brief on Questions of Law* (“Coalition Brief”).

On July 24, 2020, the hearing officer issued a *Preliminary Order Denying Transfer* (“Preliminary Order”). Duffin filed *Applicant’s Petition for Reconsideration* (“Petition”) on August 7, 2020. The hearing officer granted Duffin’s *Petition* on the basis that some of Duffin’s arguments had not been adequately addressed in the *Preliminary Order*. After carefully considering the evidence in the record, relevant legal provisions and case law, and the arguments from the parties, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application 83160 proposes to change the place of use and point of diversion for ground water right 35-7667.

2. Water right 35-7667 bears a priority date of June 11, 1992 and authorizes the diversion of 1.08 cfs from ground water and the irrigation of 53.9 acres. The existing place of use for water right 35-7667 is generally located in the south half of the SWNE, SENE and SENW of Section 20, T06S, R31E.

3. Application for Transfer proposes to change the place of use for the entire 53.9 acres authorized by water right 35-7667. The proposed place of use is located in the NENE and NWNE of Section 27, T05S, R30E. There are no other water rights at the proposed place of use.

4. Water right 35-7667 has been used to irrigate the existing place of use since at least April 1, 1980.¹

5. The existing place of use for water right 35-7667 is authorized to receive water from Aberdeen Springfield Canal Company ("ASCC") pursuant to a stock certificate issued by the company. *Stipulated Statement of Facts* at 1-2. The stock certificate states that the sixty shares represented by the certificate are appurtenant to the south half of the SWNE, SENE and SENW of Section 20, T06S, R31E. *Id.* The ASCC shares have been appurtenant to the existing place of use since at least 1970. *Id.*

6. In addition to storage water entitlements in reservoirs in the Upper Snake River system, ASCC holds the following surface water rights:

Right No.	Priority Date	Diversion Rate	Source	Irrigated Acres
01-23B	2/6/1895	1,172 cfs	Snake River	61,772.6
01-297	4/1/1939	230 cfs	Snake River	61,772.6
			Total:	61,772.6

7. Water right 35-7667 and surface water from the ASCC canal have never been used together in the same year to irrigate the existing place of use for water right 35-7667. *Stipulated Statement of Facts* at 8-10. Water right 35-7667 was used to irrigate the existing place of use from the original development of the right (in the late 1970s) to 2017. *Id.* From 2017 to the present day, the existing place of use has been irrigated exclusively with surface water from ASCC. *Id.*

¹ Proof of beneficial use for water right 35-7667 was due on or before April 1, 1980. The permit holder, Vern Duffin, did not file proof of beneficial use until June 11, 1992. At that time, Vern Duffin demonstrated that the permit had been put to beneficial use prior to the April 1, 1980 deadline. The permit was reinstated and the priority date for the right was advanced to June 11, 1992.

8. Application 83160 includes the following questions and responses from Duffin:

Question: Describe the use of any other water right(s) for the same purpose or land, or the same diversion system as right(s) proposed to be transferred at both the existing and proposed point(s) of diversion and place(s) [of] use:

Duffin Response: The current place of use is irrigated with Aberdeen-Springfield Canal Company shares. The proposed points of diversion also serve as the points of diversion for Water Right Nos. 35-2758A, 35-8370A, and 35-14444.

Question: Describe the effect on the land now irrigated if the place or purpose of use is changed pursuant to this transfer:

Duffin Response: The current place of use will still be irrigated with recently acquired Aberdeen-Springfield Canal Company Shares.²

RELEVANT LEGAL PROVISIONS

Idaho Code § 42-222(1) sets forth the criteria used to evaluate transfer applications and states, in pertinent part:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. . . . In the event the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny the same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter set forth.

Idaho Code § 42-202B(1) states:

"Consumptive use" means that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from

² The administrative record establishes that the ASCC shares at the existing place of use for water right 35-7667 were not "recently acquired." The shares have been associated with the existing place of use since at least 1970. *Stipulated Statement of Facts* at 1-2.

soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state. Consumptive use is not an element of a water right. Consumptive use does not include any water that falls as precipitation directly on the place of use. Precipitation shall not be considered to reduce the consumptive use of a water right. "Authorized consumptive use" means the maximum consumptive use that may be made of a water right. If the use of a water right is for irrigation, for example, the authorized consumptive use reflects irrigation of the most consumptive vegetation that may be grown at the place of use. Changes in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code.

ANALYSIS

Enlargement

Barron v. Idaho Department of Water Resources

In 2001, the Idaho Supreme Court issued a decision in *Barron v. Idaho Dep't of Water Resources* (19 P.3d 219, 135 Idaho 415). *Barron* addressed enlargement issues very similar to those raised in this contested case. Because *Barron* is central to the outcome of this case, it is important to provide a summary of the underlying facts of that case and the decisions issued by the Department, the District Court, and the Idaho Supreme Court.

On June 16, 1997, Charles Barron ("Barron") filed Application for Transfer 5116 ("Application 5116"), proposing to change the point of diversion and place of use for water right 37-2801B. At the time Application 5116 was filed, water right 37-2801B bore a priority date of August 9, 1905 and authorized the diversion of 6.00 cfs from Camas Creek for the irrigation of 311 acres in Sections 30 and 31, T01S, R14E.³ Application 5116 proposed to split water right 37-2801B into two pieces. The proposed points of diversion were located approximately fifteen miles upstream and eighty miles downstream of the existing point of diversion.

In 1997, when Barron filed Application 5116, the existing place of use for water right 37-2801B was owned by Lynn E. Stevenson ("Stevenson"). On October 10, 1973, Stevenson filed Application for Permit 37-7295 with the Department, seeking a permit to divert 6.00 cfs from ground water for the irrigation of 320 acres in Sections 30 and 31, T01S, R14E. Application 37-7295 did not identify any other water rights at the proposed place of use. The Department approved Application 37-7295 on November 9, 1973.

The Department conducted a beneficial use field examination for Permit 37-7295 in August 1979. The field examiner did not identify any other rights associated with or used at the irrigated place of use and indicated that the ground water diverted under water right 37-7295 was not co-mingled with any other water sources. The Department issued a license for water right 37-7295 on February 29, 1980. Water right 37-7295, as licensed, authorized the diversion of 3.78 cfs from

³ Water right 37-2801B is no longer a valid water right. On June 24, 2008, the Snake River Basin Adjudication Court issued a partial decree, disallowing the water right with prejudice.

ground water for the irrigation of 320 acres in Sections 30 and 31, T01S, R14E. The authorized place of use was nearly identical to the place of use described under water right 37-2801B.

As part of the enlargement review for Application 5116, the Department had to confirm that the proposed points of diversion would not provide a more reliable supply of water than the existing point of diversion. Changing a point of diversion in an attempt to increase the available water supply or to avoid priority curtailment may result in an enlargement of use of the transferred right. In addition, the Department had to address the enlargement issues associated with separating or unstacking overlapping water rights 37-2801B and 37-7295. Therefore, the Department's enlargement review consisted of two components.

In an attempt to address the first enlargement issue (improving the water supply for water right 37-2801B), the Department requested information about the amount of water historically available from Camas Creek at the existing point of diversion. Despite multiple requests for this information, Barron did not provide any records of the historical diversion from Camas Creek under water right 37-2801B. Without this information, the Department was unable to confirm that Barron would not improve his source of water through the proposed change. Further, without the information, the Department was unable to confirm that the proposed change would not injure existing water rights on Camas Creek.

On October 28, 1998, the Department issued a preliminary order denying Application 5116. In addition to other conclusions of law, the Department's order included the following conclusions of law:

3. The applicant has not provided suitable information relative to past use of right no. 37-02801, non-injury to other water rights or to non-enlargement in use to allow the department to approve the application.
5. The proposed changes will constitute an enlargement in use of the original right.

Barron appealed the Department's decision to the Idaho District Court (Fifth Judicial District). On August 6, 1999, Judge Barry Wood issued a decision affirming the Department's denial of Application 5116. *Barron v. Idaho Dep't of Water Resources*, CV 98-00749 (Idaho Fifth Dist. Ct. 1999). Judge Wood addressed the lack of historical diversion data and the enlargement issues associated with unstacking water rights in separate sections of his decision. *Id.* at 12-18. One of these sections was titled "Historic Consumptive Use of Water Right 37-02801B." *Id.* The other section was titled "Enlargement of Use – 37-02801B vs. 37-07295." *Id.* On the question of unstacking water rights, Judge Wood held: "To ensure no enlargement, there would necessarily have to be some affirmative showing by the owner of water right 37-07295 that it would no longer be used." *Id.* at 16.

Duffin argues that the Department's denial of Application 5116 and the District Court's affirmation were based solely on the "failure of the applicant Barron to provide information necessary for IDWR to meet its statutory obligation to analyze the transfer under Idaho Code § 42-222." *Petition* at 23. This is an incorrect reading of the District Court's decision and a misunderstanding of the two distinct enlargement issues raised by Application 5116. The District

Court recognized that there were enlargement issues related to changing points of diversion on Camas Creek (which could not be properly evaluated due to a lack of evidence from Barron) and enlargement issues related to unstacking water rights (which could be evaluated with the evidence in the record). Stated differently, Barron's failure to provide evidence about the historical availability and use of water right 37-2801B had no effect on the District Court's decision that separating or unstacking water rights 37-2801B and 37-7295 would constitute an enlargement of water right 37-2801B.

The case was ultimately appealed to the Idaho Supreme Court. On February 6, 2001, the Idaho Supreme Court issued the decision cited above, affirming the Department's denial of Application 5116. Like the District Court, the Supreme Court recognized that there were two distinct enlargement issues presented in the case. The Supreme Court separated its analysis of "Enlargement in Use" into three subsections: (a) Historical Consumptive Use, (b) The Relationship between Water Rights 37-02801B and 37-7295, and (c) Historical Availability. *Barron*, 18 P.3d at 223-225, 135 Idaho at 418-420. Sub-section (a) titled "Historical Consumptive Use" concludes with the following statement: "It therefore appears from the record that Barron failed to provide the [Department] with sufficient information to establish the historical consumptive use." *Id.* Sub-section (b), which addresses the enlargement issues associated with unstacking overlapping water rights, contains no reference to Barron's failure to provide records of historical use. *Id.* In sub-section (b), the Supreme Court held:

The problem arising with Barron's proposed transfer is that the previously combined use of the two water rights is limited to the consumptive use on the 311 acre tract of land. If water right 37-02801 is moved to another tract, (or tracts) with the result that the two rights would irrigate more than 311 acres, then there is an enlargement of the water right.

Barron, 18 P.3d at 224-225, 135 Idaho at 419-420.

In spite of the clear bifurcation of enlargement issues in the District Court and Supreme Court decisions, Duffin contends that the courts' language about unstacking water rights was judicial dictum. *Petition* at 23-26. Duffin asserts that the primary issue of the case was Barron's failure to provide evidence of historical use under water right 37-2801B. *Id.* at 19-26. Therefore, according to Duffin, any language about enlargement of water rights as a result of unstacking overlapping water rights is not essential to the primary outcome of the case and can be ignored by the hearing officer.

Duffin's arguments about judicial dictum are not persuasive. The question of enlargement as a result of unstacking overlapping water rights was squarely before both the District Court and the Supreme Court. The courts set forth clear principles of law that can be applied to this contested case. Even if the language cited by the hearing officer is dictum, it only means that the hearing officer is not bound by that language. It does not mean that the enlargement principles set forth by the courts are incorrect. The hearing officer finds that the enlargement review described by the District Court and the Supreme Court is the proper method to evaluate enlargement concerns related to overlapping irrigation rights.

Applying *Barron* to Application 83160

The term “enlargement” includes “any increase in the beneficial use to which an existing water right has been applied, through water conservation and other means.” *Fremont-Madison Irrigation Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996) (citation omitted). “An enlargement may include such events as an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion.” *Id.*

In light of the *Barron* decision, the outcome of this contested case is clear. In Application 83160, Duffin proposes to change the place of use for water right 35-7667. The proposed place of use has no existing water rights. The existing place of use for water right 35-7667 is also covered by shares from ASCC. Duffin does not propose to move the ASCC shares with water right 35-7667 to the proposed place of use. Instead, Duffin proposes to continue to irrigate the existing place of use with water under their ASCC shares.

The proposed change to water right 35-7667 will result in an increase in the number of acres irrigated, which is an enlargement, as noted above. Currently, water right 35-7667 and the ASCC shares authorize the irrigation of the same 53.9 acres. These two water rights, in combination, represent a single beneficial use of water at the existing place of use – the irrigation of 53.9 acres. If these two rights were separated or unstacked, the beneficial use associated with the water rights would double, because the acres being irrigated under the water rights would double. Water right 35-7667 and the ASCC shares represent a single beneficial use of water (the irrigation of 53.9 acres) regardless of whether the acres have been irrigated with ground water, surface water, or both in the same irrigation season. The changes proposed in Application 83160 would result in an enlargement of water right 35-7667 and must be denied pursuant to Idaho Code § 42-222(1).

Supplemental Nature of Water Right 35-7667

In their respective briefs, the parties provided extensive argument about whether water right 35-7667 should be considered a primary water right or a supplemental (secondary) water right. The enlargement analysis would be identical in either case. Water right 35-7667 and the ASCC shares each represent a full water supply for the irrigation of the existing 53.9-acre place of use, but the total combined beneficial use for the two sources has always been no more than 53.9 irrigated acres. Based on statements in Application 83160, Duffin intends to exercise their water rights (35-7667 and ASCC shares) in a way that will result in 107.8 acres being irrigated for the full irrigation season, instead of the 53.9 acres which are currently irrigated under the rights. Duffin does not propose to divide the existing beneficial use between the two water rights, so there is no need for an analysis of the historical primary or supplemental use under the rights. Duffin’s proposed change is a clear enlargement of the rights and cannot be approved.

Separate Sources Not Used in Same Year

Duffin argues that the ASCC shares and water right 35-7667 do not represent a combined beneficial use of water because the two sources of water have never been used to irrigate the existing place of use in the same irrigation season. *Duffin Brief* at 24. Duffin’s arguments on this

point are not persuasive. In *Barron*, there was no evidence that the two sources of water (Camas Creek and ground water) had ever been used to irrigate the subject acres in the same irrigation season. See *Barron v. Idaho Dep't of Water Resources*, CV 98-00749 at 9-10 (Idaho Fifth Dist. Ct. 1999) (“The record is devoid of evidence as to the intentions of Lynne [sic] Stevenson with respect to water right 37-02801B after he established groundwater right 37-07295 for use on the same ground, i.e., whether Stevenson intended to continue using 37-02801B after he established 37-07295.”). In fact, the *Barron* administrative record did not include any evidence that surface water right 37-2801B had ever been diverted by Stevenson after ground water right 37-7295 was established. *Id.*

Even though there was no evidence that the two sources were ever used in the same irrigation season, the *Barron* District Court confirmed that the proposal to separate or unstack the water rights was an enlargement, which could only be remedied by drying up acres under one of the water rights. *Id.* at 16 (“To ensure no enlargement, there would necessarily have to be some affirmative showing by the owner of water right 37-07295 that it would no longer be used.”) The Idaho Supreme Court also found that unstacking water rights 37-2801B and 37-7295 without drying up acres would constitute an enlargement of the water rights. *Barron*, 18 P.3d at 224-225, 135 Idaho at 419-420 (“The problem arising with Barron’s proposed transfer is that the previously combined use of the two water rights is limited to the consumptive use on the 311 acre tract of land. If water right 37-02801 is moved to another tract, (or tracts) with the result that the two rights would irrigate more than 311 acres, then there is an enlargement of the water right.”)

Enlargement is not contingent on the previous comingling of water rights from different sources. Rather it is based on the combined beneficial use represented by authorized places of use for the water rights. Water right 35-7667 and the ASCC shares represent a combined beneficial use of water (the irrigation of 53.9 acres) regardless of whether the acres have been irrigated with ground water, surface water, or both in the same irrigation season.

Combined Limit Conditions

One of Duffin’s primary arguments is that water right 35-7667 does not bear any combined acre limit condition with the ASCC water rights. *Duffin Brief* at 4-11, 21-23; *Petition* at 7. According to Duffin, “[t]his should end the inquiry as to whether there is any combined limit or connection with surface water allocated to Duffin’s ASCC shares.” *Id.* In *Barron*, the license issued for ground water right 37-7295 did not contain any reference to water right 37-2801B or any reference to surface water use on the property. The application for permit filed by Stevenson in 1973 did not identify any surface water rights at the proposed place of use described in the application. The beneficial use field examiner for water right 37-7295 did not identify water right 37-2801B or any other additional water supply for the irrigated acres. It is unclear whether Stevenson was even aware that water right 37-2801B was appurtenant to his irrigated acres. In contrast, Duffin and their predecessors in interest were fully aware of the existence of surface water (ASCC shares) on the irrigated acres. See Application for Permit 35-9000 (filed by Vern Duffin on April 30, 1992, proposing to irrigate the same acres as described in water right 35-7667, and acknowledging the existence of ASCC shares on the property).

The question of whether two water rights represent a combined beneficial use is determined by the place of use descriptions for the rights, not by the existence of or absence of water right conditions. If two water rights authorize the irrigation of the same acres, then the water rights represent a combined irrigation use on the overlapping acres, regardless of whether the water right overlap is recognized in a condition. In this case, it is undisputed that water right 35-7667 and the ASCC shares are appurtenant to the same acres and have been for at least forty years. Therefore, these two rights represent a combined beneficial use for irrigation. Separating or unstacking these water rights without a reduction in authorized beneficial use at the existing place of use would constitute an enlargement of the rights.

Ownership of Water Rights at Existing Place of Use

Duffin contends that that Department cannot consider the ASCC water rights appurtenant to the existing place of use when conducting its enlargement review because Duffin does not own the ASCC rights and has no authority to make changes to those rights. *Petition* at 5-6 (“Duffin has not proposed to amend any element of ASCC’s water rights, nor could he without authorization from ASCC.”). The fact that Duffin does not own all of the irrigation water rights at the existing place of use does not affect the enlargement analysis set forth above. In *Barron*, the transfer applicant (Charles Barron) did not own all of the water rights at the existing place of use. *Barron*, 18 P.3d at 220-221, 135 Idaho at 414-415. Stevenson owned water right 37-7295 and owned the existing place of use. *Id.* *Barron* confirms that the ownership of the overlapping irrigation rights is of no consequence when conducting an enlargement review. In this case, Duffin does not own the ASCC water rights, but does own the existing place of use. Therefore, Duffin could address the enlargement concerns by drying up the existing place of use and holding their ASCC shares unused. Duffin, however, has made no such proposal.

Department’s Transfer Memo

Duffin relies heavily on a 2009 administrative memo (“Transfer Memo”) signed by former IDWR employee Jeff Peppersack (“Peppersack”), who served as the Water Allocations Bureau Chief prior to his retirement in 2018.⁴ *See* Transfer Processing Policies & Procedures (December 21, 2009). Duffin argues that the hearing officer’s enlargement analysis is directly contrary to the *Transfer Memo*. *Petition* at 10-11. Duffin cites the deposition of Peppersack from a separate contested case proceeding (where Peppersack was asked about certain provisions of the *Transfer Memo*) and suggests that the hearing officer is bound by Peppersack’s deposition. *Id.* The hearing officer is not bound by Peppersack’s personal interpretation of the *Transfer Memo*. Nor is the hearing officer bound by a guidance memo, if the memo is inconsistent with Idaho law. Ultimately, however, Duffin’s arguments related to the *Transfer Memo* are meaningless because Duffin is alleging a conflict where there is none. This order is consistent with the *Transfer Memo*.

⁴ Duffin asserts that the *Transfer Memo* should be afforded “considerable weight” by the hearing officer (*Duffin Brief* at 13-14) and even suggests that the *Transfer Memo* should be given more weight than *Barron*. *Petition* at 19. Duffin notes that the *Transfer Memo* (which was adopted eight years after *Barron*) does not even mention *Barron* and therefore “the Department does not consider certain portions of this case to be binding legal precedent.” *Petition* at 24. The 37-page *Transfer Memo* contains only one case citation (*Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982)). *Transfer Memo* at 24. Therefore, Duffin’s argument that a lack of citation to *Barron* in the *Transfer Memo* constitutes a rejection of the enlargement principles set forth in *Barron* is without merit.

The *Transfer Memo* includes a section describing the enlargement considerations when an application for transfer proposes to change the place of use for a water right that is stacked with other water rights. It states:

Stacked Water Rights. Water rights are “stacked” when two or more water rights, generally of different priorities and often from different sources, are used for the same use and overlie the same place of use. Water rights for irrigating a permissible place of use are not necessarily stacked when the water rights in total provide for irrigating up to the maximum acreage authorized within a permissible place of use. An application for transfer proposing to “unstack” one or more water rights used for irrigation or other use, without changing all the rights for the same use, is presumed to enlarge the water right. . . .

Transfer Memo at 28.

The *Transfer Memo* presents the same enlargement principles as those set forth in the *Barron*. In this case there are two water rights (35-7667 and the ASCC water rights) with different priority dates from different sources that are used for irrigation and overlie the same place of use.⁵ “An application for transfer proposing to ‘unstack’ one or more water rights used for irrigation . . . without changing all the rights for the same use is presumed to enlarge the water right.” *Id.* Duffin proposes to change the place of use for water right 35-7667, but does not propose to include the ASCC water rights in the change. Therefore, according to the *Transfer Memo*, the proposed change is presumed to enlarge water right 35-7667. The *Transfer Memo* includes additional language related to the transfer of supplemental water rights. Duffin, however, asserts that water right 35-7667 has never been a supplemental right, so those sections of the *Transfer Memo* would not apply to Application 83160.

Other Water Rights at Existing Place of Use

Idaho Code § 42-222 states that the Director shall approve a proposed change (assuming all of the other elements of review are satisfied) if “the change does not constitute an enlargement in use of the original right.” Idaho Code § 42-202B contains the same phrase: “the change does not constitute an enlargement in the use of the original right.” Duffin argues that the plain language of Sections 42-222 and 42-202B prohibits the Department from considering other water rights at the existing place of use when conducting its enlargement review. *Petition* at 13-16. According to Duffin, the question of enlargement “is specific to the elements of a singular water right . . . not associated water entitlements (such as water from canal company shares) that may be associated with the same property as the original water right that are not subject to the transfer application.” *Id.* at 14.

Idaho Code §§ 42-222 and 42-202B do not prohibit the Department from considering other water rights at the existing place of use when conducting its enlargement review. These sections only state that the use of the original water right (the right being changed) cannot be

⁵ It is important to note that the *Transfer Memo* does not require that a stacked water right include combined acre limit conditions referring to the other stacked water rights. According to the *Transfer Memo*, irrigation water rights are considered stacked simply by having overlapping places of use.

enlarged. In *Barron*, both the District Court and the Supreme Court freely considered the other water right at the existing place of use (37-7295) in their enlargement review. Further, it is easy to frame the enlargement concerns of this case solely in terms of the right being transferred (35-7667). At its current state at the existing place of use, the record establishes that during times when Duffin diverts water from the ASCC canal to irrigate the existing place of use, water right 35-7667 is not used. If Application 83160 were approved, during times when Duffin diverts water from the ASCC Canal to irrigate the existing place of use, water right 35-7667 will be diverted for irrigation of 53.9 acres at the proposed place of use. This is an enlargement of use under water right 35-7667. Duffin's argument that the Department is restricted in considering other rights at the existing place of use has no merit.

Duffin's Proposed Enlargement Analysis

Historically, the Department has held that water rights appurtenant to the same irrigated acres cannot be separated or unstacked without a reduction in the total authorized beneficial use under one or both of the rights. *Transfer Memo* at 28; *Petition* at 17 (quoting 1998 letter from the Department confirming that separating stacked water rights without a reduction in beneficial use constitutes enlargement). The *Duffin Brief* and *Petition* propose a new method of evaluating enlargement in transfer applications seeking to separate or unstack irrigation rights

Duffin asserts that, in the absence of combined acre limit conditions, the Department must ignore other water rights at the existing place of use when performing its enlargement review. *Duffin Brief* at 21-24; *Petition* at 6-12 and 14-16. Duffin asserts that the Department cannot consider water provided by a canal company in its enlargement review because the property owner does not own the canal company water rights. *Petition* at 5-6. Duffin asserts that the enlargement review for ground water rights should be confined to a determination of whether the ground water right is a primary right. If the Department determines that the water right proposed to be transferred has been the primary source of irrigation water for the existing place of use, then, according to Duffin, the enlargement analysis is complete and the ground water right can be transferred without enlargement concerns.

Duffin's new approach to enlargement, if adopted by the Department, could have far-reaching effects. Consider, for example, just the ground water rights within the digital service boundary for ASCC. The water rights held by ASCC authorize the irrigation of 61,772.6 acres. *Duffin Brief*, Exhibit 3, Deposition of Michael Holliday (August 29, 2017) at 16. According to the Department's water right records, approximately 27,000 of these acres are overlapped by ground water irrigation rights. *Id.* at 18-20, 26. The vast majority of these rights (covering more than 23,000 acres) were decreed in the Snake River Basin Adjudication or licensed by the Department without combined acre limit conditions (between the ground water rights and the ASCC water rights).⁶ Assume that all of the owners of these ground water rights filed applications for transfer proposing to do the same thing proposed in Application 83160 (to unstack the water rights and develop new irrigated acres).

⁶ Many of the ground water irrigation rights overlapping ASCC acres include a remark notifying the watermaster and the Department that there are also ASCC shares at the authorized place of use. These remarks take many forms, but in substance state: "This right is combined with water from [ASCC]."

Under Duffin's proposed enlargement analysis, the Department would ignore the ASCC shares (because the ASCC water rights are not owned by the individual shareholders). In fact, under Duffin's proposed analysis, the Department would be prohibited from considering any other water rights at the existing places of use. The Department must focus its attention only on the water rights being transferred. If the various transfer applicants can show that the subject ground water rights have been used as the primary source of irrigation water, then the enlargement review is complete. The ground water rights could be transferred to irrigate new acres. Duffin's new approach to enlargement opens the door to more than 23,000 new acres being developed in the ESPA.⁷ This vast expansion of irrigated acres only accounts for the ground water rights within the ASCC digital boundary and does not include the numerous other ground water rights overlapping acres within canal companies and irrigation districts throughout the ESPA.

Any new enlargement theory that would result in a vast expansion of irrigated acres across the ESPA must be rejected. The proper enlargement analysis is described in the sections above. The Idaho Supreme Court has defined the term "enlargement" to include an increase in irrigated acres or an increase in the duration of diversion. Further, the Court has already addressed the same enlargement question presented in this case, whether unstacking overlapping irrigation rights constitutes enlargement, and has determined that it does. The Department's *Transfer Memo* states that unstacking overlapping irrigation rights is presumed to enlarge the transferred right. For these reasons, the changes proposed in Application 83160 will result in an enlargement of water right 35-7667 and must be denied.

Injury to Other Water Rights

If a transfer would result in the enlargement in use of the transferred water rights, then the proposed change will likely raise issues under the other elements of review in Idaho Code § 42-222. For example, enlargement of water rights often results in injury to junior water rights from the same source. See *In re SRBA Case No. 39576, 37723-2010* (City of Pocatello v. State of Idaho; 29-2274 et al.) (Idaho 2012) (enlargement of a senior water rights constitutes *per se* injury to junior water right holders because the enlargement diminishes the priority date of the junior water rights).

The Upper Snake River system is fully appropriated during the most of the irrigation season. Junior water rights, including junior water rights held by ASCC are curtailed every summer. Any increase in demand in the ASCC system would result in less water available to fill junior water rights on the Snake River.

On April 30, 1993, the Department issued an *Amended Moratorium Order* ("1993 Moratorium"), prohibiting the processing of applications for consumptive uses from ground water over a large portion of the Eastern Snake Plain Aquifer ("ESPA"). The *1993 Moratorium* was the result of declining aquifer levels in and spring discharges from the ESPA. *1993 Moratorium* at 1-2. The proposed point of diversion is within the designated moratorium area.

⁷ These 23,000 potential new irrigated acres would be developed in a basin where the Snake River is fully appropriated during the summer months and where the ground water aquifer is subject to the ESPA Moratorium (April 30, 1993).

Enlargement of water rights often results in injury to junior water rights that divert from the same source. Because Duffin has the authority to irrigate from ground water or surface water, the injury analysis is more challenging. Currently, Duffin may divert ground water under water right 35-7667, surface water under their ASCC shares, or both, to irrigate the 53.9 acres at the existing place of use. If Duffin diverts 1.08 cfs from ground water pursuant to water right 35-7667, there would be no need to divert water from the ASCC canal.⁸ Water right 35-7667 (which authorizes a diversion rate of 0.02 cfs/acre) represents a full supply of water. *See* Idaho Code § 42-202(6). Similarly, if Duffin irrigates the existing place of use with water from the ASCC canal, there would be no need to divert ground water under water right 35-7667.⁹

Duffin proposes to irrigate 107.8 acres by diverting water right 35-7667 and the ASCC shares in their entirety for the full irrigation season. Due to the stacked nature of the water rights, it is difficult to predict whether the injury will occur in the Snake River, the ESPA, or both. The location of injury depends on how Duffin would irrigate the 53.9 acres, if the rights remained stacked. For example, if Duffin were to continue to irrigate the existing 53.9-acre place of use with water from ASCC (assuming the rights remain stacked), then the injury would be directed to water rights in the ESPA. In other words, the irrigation of the proposed place of use with 35-7667 would be a new depletion to the ESPA that would not occur if the rights were to remain stacked. On the other hand, if Duffin were to irrigate the existing 53.9-acre place of use with ground water (assuming the rights were to remain stacked) then the injury caused by unstacking the rights would be to junior water rights on the Snake River. In either case, the proposed change will result in injury to existing water rights.

Conservation of Water Resources

Duffin will use sprinklers to irrigate the existing and proposed places of use. Sprinkler irrigation is a standard practice in Idaho and is an efficient means of irrigation. However, Duffin's proposal to double the amount of water diverted under the combined water rights (water right 35-7667 and the ASCC shares) and double the beneficial use occurring under the combined rights is antithetical to the concept of water conservation. The changes proposed in Application 83160 are not consistent with the conservation of water resources in the state of Idaho.

Local Public Interest

Local public interest is defined as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." Idaho Code § 42-202B(3). The Coalition identifies a number of local public interest factors unique to the ESPA. *Coalition Brief* at 10-14. As noted above, the proposed point of diversion is within the area governed by the *1993 Moratorium*. In 2009, the Idaho Legislature adopted a Comprehensive Aquifer Management Plan (CAMP) for the ESPA. The *ESPA CAMP* was prepared in response to "declining aquifer levels and spring discharges and changing Snake River flows that resulted in insufficient water supplies to satisfy existing beneficial uses." *ESPA CAMP* at 6. One of the

⁸ The reliability of water right 35-7667 is confirmed by the fact that Duffin was able to irrigate the 53.9 acres at the existing place of use exclusively with water right 35-7667 from 1980 to 2016.

⁹ The reliability of the ASCC shares is confirmed by the fact that Duffin has been able to irrigate the 53.9 acres at the existing place of use exclusively with water from ASCC from 2017 to the present.

objectives of the *ESPA CAMP* is to reduce the withdrawals from the aquifer. *Id.* at 7. Another objective is to increase recharge to the aquifer. *Id.* Most of the recharge water would come from the Snake River or its tributaries, including recharge through ASCC. *Id.* at 19. The existing and proposed points of diversion are within an area subject to a pending delivery call filed by the Coalition in 2005.¹⁰ In response to the delivery call, the Department has issued multiple orders curtailing junior ground water rights diverting water from the ESPA. Any increase in the consumptive use from the ESPA, or in the alternative from the Snake River, will exacerbate the conditions giving rise to the delivery call filed by the Coalition.

Given these important local public interest factors related to the ESPA, it is not in the local public interest to allow a water user to unstack or separate ground water rights and surface water rights within the boundaries of the ESPA without conditions limiting the separated water rights to the original, combined beneficial use. Duffin's proposal to separate water right 35-7667 and the associated ASCC shares and double the beneficial use occurring under the rights is not in the local public interest.

CONCLUSIONS OF LAW

The changes proposed in Application 83160 will result in an enlargement of water right 35-7667. As a result of the enlargement of water rights, the changes proposed in Application 83160 will injure other water rights, are not consistent with the conservation of water resources in the state of Idaho, and are not in the local public interest. Therefore, Application 83160 must be denied.

ORDER

IT IS HEREBY ORDERED that Application for Transfer 83160 in the name of Jeffrey and Chana Duffin is DENIED.

Dated this 12th day of August 2020.



James Cefalo
Hearing Officer

¹⁰ Documents related to the Surface Water Coalition Delivery Call can be found on the Department's website: <https://idwr.idaho.gov/legal-actions/delivery-call-actions/SWC/>

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of August 2020, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, certified with return receipt requested, to the following:

Document Served: Amended Preliminary Order Denying Transfer (83160)

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Christina Henman
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.